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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ALETHEA ELIN FOX,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,

Defendant.<sup>1</sup>

Case No.: 3:16-cv-01401

**ORDER:**

**(1) ADOPTING REPORT AND  
RECOMMENDATION;**

**(2) GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT;**

**(3) DENYING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT; and**

**(4) REMANDING FOR FURTHER  
PROCEEDINGS**

Plaintiff Alethea Elin Fox filed this action seeking judicial review of the  
Commissioner of Social Security's denial of her application for disability insurance

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<sup>1</sup> The Court substitutes Nancy A. Berryhill, the Acting Commissioner of Social Security, for Carolyn W. Colvin, the former Acting Commissioner of Social Security, as Defendant in this suit. *See* Fed. R. Civ. P. 25.

1 benefits. Plaintiff filed a motion for summary judgment. (ECF No. 16). Defendant filed  
2 a cross-motion for summary judgment. (ECF No. 18). The Honorable Andrew G.  
3 Schopler issued a thoughtful and thorough Report and Recommendation recommending  
4 that this Court grant Plaintiff's motion, deny Defendant's motion, and remand the case  
5 for further proceedings. (ECF No. 27). Defendant filed timely objections to the Report  
6 and Recommendation (ECF No. 28), to which Plaintiff replied (ECF No. 29).

7 Where a party files a timely objection to a report and recommendation, the Court  
8 reviews *de novo* those portions of the report or specific proposed findings or  
9 recommendations to which an objection is filed. 28 U.S.C. § 636(b)(1). Having  
10 conducted a *de novo* review, the Court adopts the Report and Recommendation in full.

## 11 **BACKGROUND**

12 Plaintiff applied for disability benefits claiming she has been unable to work since  
13 June 1, 2007. The Administrative Law Judge ("ALJ") found that Plaintiff suffered from  
14 the severe impairment of affective disorder, but found that she has the residual functional  
15 capacity to perform a full range of work at all exertional levels but is limited to  
16 completing simple, routine tasks in a nonpublic setting. The ALJ's decision gave "great  
17 weight" to the opinions of the state agency medical consultants, "some weight" to the  
18 opinion of the psychiatric consultative examiner, and "little weight" to the opinions of  
19 Plaintiff's two treating physicians, Dr. Wendy Khentigan and Dr. Clark Smith. (AR 25-  
20 26).

21 The issue before the Court is whether the ALJ articulated specific and legitimate  
22 reasons for rejecting the opinion of Dr. Smith. Dr. Smith is one of Plaintiff's treating  
23 psychiatrists. Plaintiff began seeing him on June 10, 2013. By the time of the  
24 administrative hearing, the ALJ had Dr. Clark's treatment records from fourteen visits by  
25 Plaintiff. Those visits occurred on June 10, 2013, July 8, 2013, August 5, 2013,  
26 September 4, 2013, October 2, 2013, October 30, 2013, December 2, 2013, January 2,  
27 2014, February 3, 2014, March 3, 2014, April 2, 2014, April 30, 2014, May 25, 2014, and  
28 June 26, 2014. (See AR Exs. 12F & 13F). As these records reveal, Plaintiff visited Dr.

1 Smith once approximately every thirty days for over a year. During her treatment, she  
2 took a mix of medications to treat her mental health and block opiate cravings. These  
3 medications included Subutex and Suboxone for the opiate cravings (AR 476, 487), and  
4 Klonopin, Lamictal, Gabapentin, Wellbutrin, Zoloft, and Saphris to treat her mental  
5 illnesses (AR 475, 480, 487). The records show that Plaintiff had good months and bad  
6 months. In some months, she reported feeling better with decreased depression and no  
7 anger, mania, or mood swings. (See AR 477, 480). In other visits, she reported feeling  
8 "really depressed," "overwhelmed," "stressed out," and "scared to go outside." (See AR  
9 478-80).

10 On November 8, 2013, Dr. Smith completed a "Mental Impairment Residual  
11 Functional Capacity Questionnaire." He noted that she has "[decreased]  
12 focus/concentration/ability to concentrate, with scattered & disjointed thought process."  
13 (AR 487). In a check-box style form, he indicated that Plaintiff has "pervasive loss of  
14 interest [in] most activities," "blunt, flat or inappropriate affect," "mood disturbance,"  
15 "difficulty thinking or concentrating," "persistent disturbances of mood or affect,"  
16 "emotional withdrawal or isolation," "bipolar syndrome with a history of episodic periods  
17 manifested by a full symptomatic picture of both manic and depressive syndromes,  
18 currently characterized by either or both syndromes," "emotional lability," "easy  
19 distractibility," and "oddities of thought, perception, speech or behavior." (AR 488). He  
20 further noted that she has "moderate" restrictions on her activities of daily living,  
21 "moderate" difficulties in maintaining social functioning, "marked" difficulties in  
22 maintaining concentration, persistence, or pace, and "one or two" episodes of  
23 decompensation within a 12-month period. (AR 497).

24 In assessing mental abilities needed to do unskilled work, Dr. Smith reported that  
25 Plaintiff was "unable to meet competitive standards" in eleven out of fifteen categories,  
26 such as "understand and remember short and simple instructions," "maintain attention for  
27 two hour segments," and "make simple work-related decisions." (AR 489). In the  
28 remaining four categories—"maintain regular attendance and be punctual within

1 customary, usual strict tolerances,” “ask simple questions or request assistance,” “get  
2 along with co-workers or peers without causing them undue distraction or exhibiting  
3 behavioral extremes,” and “be aware of normal hazards and take appropriate  
4 precautions,”—Dr. Smith noted that Plaintiff is “seriously limited, but not precluded.”  
5 (*Id.*) Dr. Smith explained that Plaintiff has a “scattered & distracted thought process,  
6 unstable mood, [and] inability to tolerate stress.” (*Id.*) He opined that Plaintiff would be  
7 expected to miss more than four days of work per month because of her impairments.  
8 (AR 492).

9 As noted, the ALJ accorded “little weight” to Dr. Smith’s opinion in the “Mental  
10 Impairment Residual Functional Capacity Questionnaire.” In rejecting his opinion, the  
11 ALJ wrote:

12 The severity of the functional limitations assessed by Dr. Smith are  
13 inconsistent with claimant’s medical records. Dr. Smith’s treatment records  
14 reveal an insignificant treatment history with the claimant and conservative  
15 psychiatric treatment. Additionally, Dr. Smith opines the claimant’s  
16 impairments began in 2003; however, there is no evidence in the record to  
17 support such a conclusion.

18 (AR 26). Judge Schopler considered the ALJ’s reasons and found them neither specific  
19 nor legitimate.

#### STANDARD OF REVIEW

20 An applicant may seek judicial review of a final agency decision pursuant to 42  
21 U.S.C. §§ 405(g), 1383(c)(3). An ALJ’s decision will be reversed by the reviewing court  
22 only if “it is based upon legal error or is not supported by substantial evidence.” *Bayliss*  
23 v. *Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citation omitted). “Substantial  
24 evidence means more than a mere scintilla but less than a preponderance; it is such  
25 relevant evidence as a reasonable mind might accept as adequate to support a  
26 conclusion.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court must  
27 consider the record as a whole, weighing both the evidence that supports and detracts  
28 from the ALJ’s conclusion. *See Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001);

1 *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). “The  
2 ALJ is responsible for determining credibility, resolving conflicts in medical testimony,  
3 and for resolving ambiguities.” *Andrews*, 53 F.3d at 1039. Where the evidence is  
4 susceptible to more than one rational interpretation, the ALJ’s decision must be upheld.  
5 *Id* at 1039-40. The Court may not reverse an ALJ’s decision on account of an error that  
6 is harmless. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

## 7 DISCUSSION

8 The medical opinion of a claimant’s treating physician is given “controlling  
9 weight” if it is “well-supported by medically acceptable clinical and laboratory diagnostic  
10 techniques and is not inconsistent with the other substantial evidence in [the claimant’s]  
11 case record.” 20 C.F.R. § 404.1527(c)(2). When a treating physician’s opinion is not  
12 controlling, it is weighted accorded to factors such as length of the treatment relationship  
13 and the frequency of examination, the nature and extent of the treatment relationship,  
14 supportability, consistency with the record, and specialization of the physician. *Id.* §  
15 404.1527(c)(2)-(6).

16 If a treating or examining physician’s opinion is contradicted by another doctor’s  
17 opinion, as here, an ALJ may only reject it by providing specific and legitimate reasons  
18 that are supported by substantial evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th  
19 Cir. 2005). “The ALJ can meet this burden by setting out a detailed and thorough  
20 summary of the facts and conflicting clinical evidence, stating his interpretation thereof,  
21 and making findings.” *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (quoting  
22 *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986)).

23 In this case, the ALJ set forth four reasons to reject Dr. Smith’s opinion: (1) the  
24 opinion’s inconsistency with Plaintiff’s medical records, (2) Plaintiff’s insignificant  
25 treatment history, (3) Plaintiff’s conservative course of treatment, and (4) an unsupported  
26 or incorrect statement by Dr. Smith that Plaintiff’s impairments began in 2003. For  
27 reasons explained more fully in the Report and Recommendation, the Court concludes  
28 that none of the ALJ’s reasons withstand scrutiny. Plaintiff saw Dr. Smith monthly for

1 over a year for psychotherapy. Such a history of treatment is not “insignificant.” Nor  
2 was Plaintiff’s treatment “conservative.” In addition to the monthly psychotherapy  
3 appointments, Dr. Smith treated Plaintiff’s condition with a number of psychotropic  
4 prescription medications. The ALJ does not point to any evidence to say that more  
5 aggressive treatment was recommended. Without further explanation why the ALJ  
6 believes Plaintiff’s treatment is “insignificant” and “conservative,” these conclusory  
7 assertions fall short of the “specific and legitimate reasons” standard.

8 The ALJ also failed to explain his conclusory finding that Dr. Smith’s opinion is  
9 inconsistent with the overall medical record. *See Trevizo v. Berryhill*, 862 F.3d 987, 999  
10 (9th Cir. 2017) (rejecting ALJ’s “conclusory determination that the [treating physician’s]  
11 opinion was contradicted where “the ALJ pointed to nothing in . . . the clinical record that  
12 contradicted the treating physician’s opinion”). The Report and Recommendation notes,  
13 and Defendant’s Objection observes, that Plaintiff exhibited some improvement. But  
14 “[t]he ALJ failed to analyze the periods of improvement in the context of [Plaintiff’s]  
15 treatment history to ensure that the improvement was not temporary.” *Colter v. Berryhill*,  
16 985 F. App’x 616, 617 (9th Cir. 2017) (citing *Ghanim v. Colvin*, 763 F.3d 1154, 1164  
17 (9th Cir. 2014) (explaining that treatment records reflecting improvement “must be  
18 viewed in light of the overall diagnostic record”)).

19 Finally, the ALJ rejects the opinion because “there is no evidence in the record to  
20 support” Dr. Smith’s statement that Plaintiff’s impairments began in 2003. Even if the  
21 ALJ were correct, such a reason is insufficient to justify a complete rejection of Dr.  
22 Smith’s opinion. Nonetheless, as explained further in the Report and Recommendation,  
23 there is evidence in Dr. Smith’s treatment notes that Plaintiff claims disability since 2003.

24 Accordingly, the Court overrules Defendant’s objections and adopts the Report and  
25 Recommendation in its entirety.

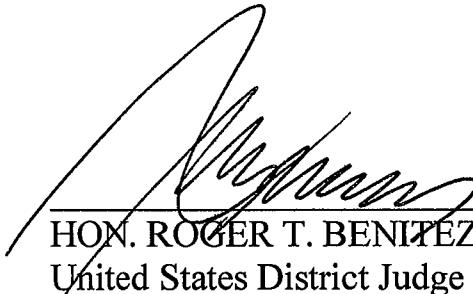
## 26 CONCLUSION

27 The Court **ADOPTS** the Report and Recommendation (ECF No. 27). Plaintiff’s  
28 motion for summary judgment is **GRANTED** (ECF No. 16) and Defendant’s motion for

1 summary judgment is **DENIED** (ECF No. 18). This case is **REMANDED** for further  
2 proceedings consistent with the Report and Recommendation.

3 **IT IS SO ORDERED.**

4  
5 Dated: 9/12/2017

6   
7 HON. ROGER T. BENITEZ  
United States District Judge